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No. 87-913

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

LOCAL 825, INTERNATIONAL UNION OF OPERATING ENGINEERS AND PATRICK CAMPBELL, Business Manager, Local 825, International Union of Operating Engineers, AFL-CIO,
Petitioners,

vs.

CATALYTIC, INC.

Respondent.

MONMOUTH & OCEAN COUNTY BUILDING TRADES COUNCIL, ASBESTOS WORKERS LOCAL 14, PAT EIDING, BOILERMAKERS LOCAL 28, DAN KEARNEY, BRICKLAYERS & CEMENT MASONS LOCAL 8, TOM FARRELL, CARPENTERS & MILLWRIGHTS LOCAL 2018, FRANK KIRAJACICH, ELECTRICAL WORKERS LOCAL 400, JIM GRATTON, IRONWORKERS LOCAL 350, TOM KEPNER, LABORERS LOCAL 415, WILLIAM COLEMAN, PAINTERS LOCAL 694, ROBERT NEWMAN, PIPEFITTERS LOCAL 9, TOM SPERLING, SHEETMETAL WORKERS LOCAL 27, ROBERT DEBARTOLLO, TEAMSTERS LOCAL 469, FRED POTTER, JR., OPERATING ENGINEERS LOCAL 825, PAT CAMPBELL, ALL OFFICERS, AGENTS, SERVANTS, MEMBERS OR EMPLOYEES OF UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY, individually and collectively, ALL OTHER PERSONS ACTING IN CONCERT WITH DEFENDANTS, individually or collectively or otherwise participating in their aid;

Other Parties.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ZACHARY SCHNEIDER
On the Petition

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QUESTIONS PRESENTED FOR REVIEW

1. Is that portion of the publicity proviso of Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4), that makes unlawful an otherwise lawful and truthful dissemination of opinions and ideas, violative of the First Amendment of the United States Constitution?

2. Was Local 825's handbilling protected activity under the First Amendment of the United States Constitution and the National Labor Relations Act, as amended?

3. Did the court below abuse its discretion in granting an injunction pursuant to Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) where the union was not engaged in a work stoppage, but rather was engaged in publicity activity protected by the Norris-La Guardia Act, 29 U.S.C. § 104(e)?

4. Did the court below abuse its discretion in issuing an injunction in accordance with this Court's decision in *Boys Market, Inc. v. Retail Clerk's Union, Local 770,* 398 U.S. 235 (1970) where all the criteria delineated in that decision are not present?

PARTIES TO THE ACTION

The parties to this action in the United States Court of Appeals for the Third Circuit were Local 825, International Union of Operating Engineers, AFL-CIO, and Patrick Campbell, Business Manager, Local 825, International Union of Operating Engineers, AFL-CIO, appellants below; Catalytic, Inc., appellee below.

The petitioners on this petition for a writ of certiorari are Local 825, International Union of Operating Engineers, AFL-CIO and Patrick Campbell, Business Manager, Local 825, International Union of Operating Engineers, AFL-CIO.

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No.

In The

Supreme Court of the United States

October Term, 1987

LOCAL 825, INTERNATIONAL UNION OF OPERATING ENGINEERS AND PATRICK CAMPBELL, Business Manager, Local 825, International Union of Operating Engineers, AFL-CIO,

Petitioners,

vs.

CATALYTIC, INC.

Respondent.

MONMOUTH & OCEAN COUNTY BUILDING TRADES COUNCIL, ASBESTOS WORKERS LOCAL 14, PAT EIDING, BOILERMAKERS LOCAL 28, DAN KEARNEY, BRICKLAYERS & CEMENT MASONS LOCAL 8, TOM FARRELL, CARPENTERS & MILLWRIGHTS LOCAL 2018, FRANK KIRAJACICH, ELECTRICAL WORKERS LOCAL 400, JIM GRATTON, IRONWORKERS LOCAL 350, TOM KEPNER, LABORERS LOCAL 415, WILLIAM COLEMAN, PAINTERS LOCAL 694, ROBERT NEWMAN, PIPEFITTERS LOCAL 9, TOM SPERLING, SHEETMETAL WORKERS LOCAL 27, ROBERT DEBARTOLLO, TEAMSTERS LOCAL 469, FRED POTTER, JR., OPERATING ENGINEERS LOCAL 825, PAT CAMPBELL, ALL OFFICERS, AGENTS, SERVANTS, MEMBERS OR EMPLOYEES OF UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY, individually and collectively, ALL OTHER PERSONS ACTING IN CONCERT WITH DEFENDANTS, individually or collectively or otherwise participating in their aid;

Other Parties.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The order to show cause and temporary restraining order entered by the United States District Court for the District of New Jersey is unreported and is printed in Appendix A hereto, *infra* at 1a.

The final judgment and order for permanent injunctive relief entered by the United States District Court for the District of New Jersey is unreported and is printed in Appendix B hereto, *infra* at 11a.

The opinion of the United States Court of Appeals for the Third Circuit, affirming the judgment of the District Court, is unreported and is printed in Appendix C hereto, *infra* at 21a.

The judgment of the United States Court of Appeals for the Third Circuit is unreported and is printed in Appendix D hereto, *infra* at 37a.

An order amending the opinion of the United States Court of Appeals for the Third Circuit is unreported and is printed in Appendix E hereto, *infra* at 40a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit in this case was filed on September 23, 1987.

This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1254, to review the judgment of the Court of Appeals,

by writ of certiorari granted upon timely petition of a party to a civil action, after rendering of judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution; 28 U.S.C. § 1651; 29 U.S.C. § 104(a); 29 U.S.C. § 104(e); 29 U.S.C. § 158(b)(4) and 29 U.S.C. § 185(a) are set forth in their entirety at Appendix F, *infra* at 42a, as provided for in Supreme Court Rule 21.1(f).

STATEMENT OF THE CASE

On June 13, 1986, members of Local 825, International Union of Operating Engineers, AFL-CIO ("Local 825") distributed leaflets outside the Oyster Creek nuclear power plant at Forked River, New Jersey. Local 825 distributed this handbill to notify the public that employees of the owner, GPU Nuclear, Inc ("GPU") and the operator of this plant, Jersey Central Power and Light Co. ("JCP&L") were performing crane work which was normally and traditionally performed by members of Local 825. Local 825 did not want to enmesh any secondary employers in its dispute with GPU and JCP&L and the handbill, specifically stated that Local 825 did not seek to induce or encourage any individual employed by any person to cease doing business with its employer. Despite this request, the members of the various building trade unions employed by the general contractor at the facility, Catalytic, Inc. (hereinafter "Catalytic"), engaged in a work stoppage.

On June 13, 1986, Catalytic filed a verified complaint and an order to show cause with an application for a temporary restraining order. Catalytic's complaint was predicated upon Section 301(a) of the Labor Management Relations Act

("LMRA"), 29 U.S.C. § 185(a) and Section 8(b)(4) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(b)(4). Catalytic sought to enjoin the work stoppage by the members of the various building trades unions. Catalytic also sought to restrain Local 825's handbilling of JCP&L and GPU and further requested the court to order the parties to arbitrate.

The case proceeded to a hearing before the Hon. Garrett E. Brown on July 1, 1986 and July 2, 1986. At this hearing, Local 825 argued that its leafletting was protected activity under the First Amendment of the Constitution, the Norris-LaGuardia Act, 29 U.S.C. § 104(e), and under the publicity proviso of Section 8(b)(4) of the NLRA, 29 U.S.C. § 158(b)(4). Local 825 asserted that if its leafletting could be enjoined under the publicity proviso, then that portion of the statute was unconstitutional as violative of the union's First Amendment rights. Local 825 also argued that injunction could not issue under Section 301(a) of the LMRA, 29 U.S.C. § 185(a) since Local 825 had not engaged in a work stoppage and that no arbitrable dispute existed between Local 825 and Catalytic.

The dispute between Local 825 and GPU and JCP&L arose because the owner retained unto itself the crane work while all other construction work went to Catalytic. The last collective bargaining agreement between Local 825 and Catalytic was entitled "Labor Agreement A, revision #2," and this agreement contained a clause which provided:

> The Owner's speciality shops, such as welding shop, machine shop, operations, instrument shop, crane services, janitorial services, trucking, etc. will support building trades craft by providing the required support services.

Starting in the fall of 1985, a representative of Local 825 observed

employees of GPU or JCP&L doing crane work normally and traditionally performed by Local 825 operators. When Local 825 contacted Catalytic to complain about this situation, Catalytic advised Local 825 that there was nothing they could do since they did not own the cranes and because they could not demand work from GPU.

At the time Local 825 handbilled, Labor Agreement A, revision #2 had expired by its own terms. Local 825 did not agree nor did it execute a memorandum of understanding which would have extended Labor Agreement A, revision #2 until September 1, 1988. During negotiations in the spring of 1986, Local 825 made its position clear. Local 825 indicated that it would not sign a new agreement with Catalytic unless the crane service provision of the old agreement was changed. No agreement was reached.

Local 825's dispute with GPU and JCP&L was not a dispute that could be remedied in an arbitration proceeding between Local 825 and Catalytic. Both the District Court and the Third Circuit ignored an essential and critical fact, Local 825 did not engage in activity which constituted a breach of the expired collective bargaining agreement. Unlike the other union, Local 825 did not engage in a strike or work stoppage. Local 825 merely handbilled to protest the actions of GPU and JCP&L.

A final judgment and order for permanent injunctive relief was entered by the District Court on October 16, 1986 (11a). This order contains the court's findings of fact and conclusions of law (17a). This order completely enjoined Local 825's handbilling at the job site (18a).

The District Court's factual analysis was recited with approval by the Third Circuit in its opinion affirming the judgment on September 23, 1987 (21a). The Third Circuit concentrated on one question: Whether a *Boys Market* injunction could issue when

the union has not engaged in a strike. The court did not answer a critical issue which was argued by appellants. That issue was whether the publicity proviso of Section 8(b)(4) of the NLRA, 29 U.S.C. § 158(b)(4) prohibits a union's leafletting where said activity affects a secondary party, and if so, is that portion of the statute unconstitutional as violative of the union's First Amendment freedom of speech rights.

REASONS FOR GRANTING THE WRIT

I.

This case presents a question regarding the fundamental First Amendment freedom of speech rights of unions and union members to disseminate opinions and ideas to the public. Dissemination of information concerning the facts of a labor dispute has been regarded as within the area of free speech, guaranteed by the First Amendment of the Constitution. *Thornhill v. Alabama,* 310 U.S. 88, 101-102 (1940); *Bakery and Pastry Drivers and Helpers, Local 820 v. Wohl,* 315 U.S. 769, 777 (1942). The distribution of handbills is a form of "pure speech" which is protected by the First Amendment. *Rosen v. Port of Portland,* 641 F.2d 1243, 1245 (9th Cir. 1981), *see Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971).

The District Court found, and the Third Circuit affirmed that Local 825's handbilling was akin to picketing because this activity sent a "signal" to the members of the other building trade unions. However, picketing has been viewed by this Court as a mode of communication that is different from handbilling. *Wohl, supra; accord, Hughes v. Superior Court,* 339 U.S. 460 (1950). Picketing and patrolling is conduct, not speech, and is not directly protected by the First Amendment of the Constitution. *Id.*

In enacting the secondary boycott provision of the NLRA, 29 U.S.C. § 158(b)(4), Congress intended to curb consumer picketing where it shut off patronage of a secondary employer in order to put pressure on the secondary to stop dealing with the employer with whom the union had its primary dispute. *NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 760,* 377 U.S. 58, 67 (1964) (*Tree Fruits*). Congress enacted this statute to regulate unions' conduct, not speech. Non-picketing publicity was not the target of the prohibitions of 29 U.S.C. § 158(b)(4).

This section of the NLRA contains a proviso regarding publicity which states:

> That for purposes of this paragraph (4) only, *nothing in such paragraph shall be construed to prohibit publicity, other than picketing*, for the purpose of truthfully advising the public, including customers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, so long as such publicity does not have an effect of inducing any individual employee by any person other than the primary employer in the course of his employment to refuse to pick up, deliver or to transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

(Emphasis added.) This proviso was not intended to be a ban on the union's right to publicize the facts of a labor dispute. *See Tree Fruits, supra.*

The Eleventh Circuit in *Florida Gulf Building and Construction Trades Council v. NLRB*, 796 F.2d 1328 (11th Cir. 1986), *cert. granted*, 55 U.S.L.W. 3820 (U.S. July 28, 1987) (No. 86-1461), offered two interpretations of the publicity proviso. The first interpretation is that this section was drafted to cover non-picketing publicity in only one situation, that being a consumer boycott case where the union seeks to cut off the patronage and supply of a secondary employer that sells or distributes the product of the primary employer. 796 F.2d at 1341. The second interpretation is that the publicity proviso was only intended to be a prohibition on secondary consumer picketing and that the proviso was not intended to apply to non-picketing publicity, such

as handbilling. 796 F.2d at 1343. Under either of these interpretations, Local 825's handbilling should not have been prohibited. The Third Circuit disregarded the Eleventh Circuit's interpretations of the proviso (21a).

The court below enjoined Local 825's handbilling because other persons over whom Local 825 did not exercise control, decided on their own, not to go to work for their employers. The latter portion of the publicity proviso eliminates a union's freedom of speech rights merely because of the reactions of third parties. This latter portion of the publicity proviso is inapposite to a basic principle underlying the right of free speech. Speech does not lose its protected character simply because it embarrasses others or coerces them into action. *Wohl, supra; Keefe, supra; Florida Gulf, supra,* 796 F.2d at 1332. Merely because a union's speech has a negative impact or effect on a third party should not remove said activity from the protection of the First Amendment. *Keefe, supra,* 402 U.S. at 419.

The government's ability to restrict expressive conduct is very limited. *United States v. Grace,* 461 U.S. 171, 177 (1983). The government may enforce reasonable time, place, and manner regulations as long as the restrictions are "content-neutral, are narrowly tailored to serve a significant government interest, and leave open amply alternative channels of communication." *Id.* (citations omitted). In *Grace,* this Court ruled on a question of whether restrictions on leafletting around the Supreme Court building was constitutional. The restriction only limited speech during the hours the Supreme Court building was open. 461 U.S. 178, n. 7. Nonetheless, this Court ruled that portion of the statute that prohibited expressive activity on the public sidewalk outside the building was unconstitutional. 461 U.S. at 181.

An absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling

governmental interest. *Grace, supra,* 461 U.S. at 177 (citations omitted). Without citing any precedent or reasons, the Third Circuit held that the latter part of the publicity proviso did not impose an unreasonable time, place and manner regulation on a union's speech. In a non-labor setting, a prospective restriction on speech similar to what is imposed in the publicity proviso would not be permitted. For example, a person peacefully distributes a leaflet in a public park which truthfully criticizes a local governmental official, and after reading this leaflet a group of concerned citizens engage in a sit-in at town hall. This unsolicited reaction of third parties would not remove the lawful speech from the protections of the First Amendment. The latter portion of the publicity proviso imposes a total ban on a union's speech, including handbilling, merely because a third party over whom the union exercises no control refuses to perform services for another third party. Such a restriction is not justified and is overbroad, and should be deemed to be an unconstitutional restriction of the union's freedom of speech rights.

II.

This Court's decision in *Boys Market, supra,* carved out a narrow exception to the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. § 104(a). This Court held an injunction may issue against a union engaged in a strike where said strike constitutes a breach of a no-strike obligation under an effective collective bargaining agreement and the parties are contractually bound to arbitrate the underlying grievance which caused the strike. 398 U.S. at 254. The question posed in this case is whether a *Boys Market* injunction may issue where the union was not engaged in a work stoppage, and the employer had not employed Local 825 members for at least one year prior to the leafletting activity.

The Third Circuit relied upon *Pittsburgh-Des Moines Steel*

Co. v. United Steelworkers of America, 633 F.2d 302 (3d Cir. 1980) to justify the issuance of an injunction against Local 825's handbilling. In *Pittsburgh-Des Moines, supra,* members of the local union engaged in a strike because of the employer's assignment of non-union employees to bargaining unit work. Both the local union and the international union were parties to an effective collective bargaining agreement. Since all of the *Boys Market, supra,* criteria were established, an injunction was issued against the local union and the international union.

In *Pittsburgh-Des Moines Steel Co., supra,* the Third Circuit vacated the injunction against the international union but indicated, *in dicta,* the court could issue an injunction against a third party where it deems it necessary to effectuate its order. 633 F.2d at 307. The authority cited by the court to extend its order to a third party was the All Writs Act, 28 U.S.C. § 1651. The Third Circuit relied upon *Pittsburgh-Des Moines* in order to restrain Local 825's handbilling in order to effectuate the injunction against other unions.

As noted by the Third Circuit, the All Writs Act has been applied in cases where the interests of the non-party closely identify with those of the defendant or the non-party stands in privity with the defendant. *See Regal Knitwear Co. v. NLRB,* 324 U.S. 9 (1945); *National Bank v. City of Norwalk,* 291 U.S. 431, 436 (1934). The court has also enjoined third parties in commercial cases, but there are no cases which support the court's conclusion that a *Boys Market* injunction may issue against a third party union, that is not in privity with the main actor, and where all of the criteria delineated in *Boys Market* are not met. The Norris-LaGuardia Act was enacted long after the All Writs Act, and the former specifically prohibits the court from issuing an injunction to restrain a union's publicity activity. 29 U.S.C. § 104(e). The court below ignored this explicit statutory prohibition.

III.

The third and fourth issues in this case present a common question: Was there dispute between Local 825 and Catalytic that could be arbitrated under an effective collective bargaining agreement?

A *Boys Market* injunction may issue against a union where the dispute that caused the work stoppage was an arbitrable dispute. This Court has refused to issue *Boys Market* injunctions against unions where the work stoppage was caused by the action of a third party. *Jackson Bulk Terminal, Inc. v. International Longshoremen's Association,* 457 U.S. 702 (1982); *Buffalo Forge v. United Steelworkers of America,* 428 U.S. 397 (1976). Local 825's leafletting was caused by the actions of GPU and JCP&L. Local 825 had no dispute with Catalytic and there was no dispute which the parties could arbitrate. Unlike the other building trade unions at the site, Local 825 did not engage in a work stoppage. Local 825 did not breach any provision of the alleged collective bargaining agreement by handbilling outside the Forked River facility.

Once a party gives notice of its intention to negotiate a new agreement, if no agreement is reached, the old agreement terminates. *See Paterson Parchment Paper Co. v. International Brotherhood of Papermakers,* 192 F.2d 252 (3d Cir. 1951), *cert. denied,* 342 U.S. 953, *pet. for reh. denied,* 342 U.S. 956 (1952); *accord, Oil, Chemical & Atomic Workers, International Union v. American Maize Products Co.,* 492 F.2d 409 (7th Cir.), *cert. denied,* 417 U.S. 969 (1974). Notice by one party to modify the old contract or to meet to discuss revisions is a manifestation of an unwillingness to continue under the provisions of the old agreement beyond its expiration. *Id.* In this case, the parties' agreement expired by its own terms on February 28, 1986. Prior to the expiration, Local 825 informed Catalytic that it would not

sign a new agreement until the clause concerning crane services was modified. Local 825 refused to extend the terms of the old agreement and refused to execute the memorandum of understanding which would have extended the agreement past its expiration date. The court below erroneously determined that the agreement had not expired, and the court abused its discretion in ordering Local 825 to arbitrate a non-arbitrable dispute under an expired agreement.

CONCLUSION

For all the reasons set forth herein, the Court should grant the petition for writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

ZACHARY SCHNEIDER
SCHNEIDER, COHEN,
SOLOMON, LEDER &
MONTALBANO
Attorneys for Petitioners

APPENDIX A—UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER, JUNE 18, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION
NO. Civ. 86-2326 (GEB)

CATALYTIC, INC.,
Centre Square West
1500 Market Street
Philadelphia, PA 19102

Plaintiff

V.

MONMOUTH AND OCEAN COUNTY
BUILDING TRADES COUNCIL
Highway 38
P.0. Box 1256
Wall, NJ 07719

and

ASBESTOS WORKERS LOCAL 14
6513 Bustleton Avenue
Philadelphia, PA 19124

and

Appendix A

PAT EIDING,
Business Manager,
Asbestos Workers Local 14
6513 Bustleton Avenue
Philadelphia, PA 19124

and

BOILERMAKERS LOCAL 28
976 Broadway
Bayonne, NJ 07002

and

DAN KEARNEY,
Business Manager,
Boilermakers Local 28
976 Broadway
Bayonne, NJ 07002

and

BRICKLAYERS AND CEMENT
MASONS LOCAL 8
122 Drummond Avenue
Nepute, NJ 07753

and

TOM FARRELL,
Business Manager,
Bricklayers and Cement
Masons Local 8
122 Drummond Avenue
Nepute, NJ 07753

Appendix A

and

CARPENTERS AND MILLWRIGHTS
LOCAL 2018
3015 Lakehurst Road
Lakehurst, NJ 08773

and

FRANK KIRAJACICH,
Business Manager,
Carpenters and Millwrights
Local 2018
3015 Lakehurst Road
Lakehurst, NJ 08733

and

ELECTRICAL WORKERS LOCAL 400
Highway 38
P.O. Box 1256
Wall, NJ 07719

and

JIM GRATTON,
Business Manager,
Electrical Workers Local 400
Highway 38
P.O. Box 1256
Wall, NJ 07719

and

Appendix A

IRONWORKERS LOCAL 350
5305 Atlantic Avenue
Ventnor City, NJ 08406

and

TOM KEPNER,
Business Manager,
Ironworkers Local 350
5305 Atlantic Avenue
Ventnor City, NJ 08406

and

LABORERS LOCAL 415
36 North Illinois Avenue
Atlantic City, NJ 08401

and

WILLIAM COLEMAN,
Business Manager,
Laborers Local 415
36 North Illinois Avenue
Atlantic City, NJ 08401

and

PAINTERS LOCAL 694
122 Drummond Avenue
Neptune, NJ 07753

and

Appendix A

ROBERT NEWMAN,
Business Manager,
Painters Local 694
122 Drummond Avenue
Neptune, NJ 07753

and

PIPEFITTERS LOCAL 9
9 Gilbert Road
West Tinton Falls, NJ 07701

and

TOM SPERLING,
Business Manager,
Pipefitters Local 9
9 Gilbert Road West
Tinton Falls, NJ 07701

and

SHEETMETAL WORKERS LOCAL 27
884 Livingston Avenue
Brunswick, NJ 08902

and

ROBERT DEBARTOLLO,
Business Manager,
Sheetmetal Workers Local 27
884 Livingston Avenue
Brunswick, NJ 08902

Appendix A

and

OPERATING ENGINEERS LOCAL 825
Route 46 East
Little Falls, NJ 07242

and

PAT CAMPBELL,
Business Manager,
Operating Engineers Local 825
Route 46 East
Little Falls, NJ 07242

and

ALL OFFICERS, AGENTS, SERVANTS
MEMBERS OR EMPLOYEES OF UNITED
ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF
THE PLUMBING AND PIPEFITTING INDUSTRY,
INDIVIDUALLY AND COLLECTIVELY

and

ALL OTHER PERSONS ACTING IN
CONCERT WITH DEFENDANTS,
INDIVIDUALLY OR COLLECTIVELY,
OR OTHERWISE PARTICIPATING
IN THEIR AID

Defendants

Appendix A

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

AND NOW, this day of June 1986, upon consideration of the Verified Complaint, Affidavits and Application for Order to Show Cause and Temporary Restraining Order filed by counsel for Plaintiff, and after conference in chambers with counsel for Plaintiff and counsel for Defendants and a finding by the Court that:

1. Plaintiff Catalytic, Inc. and Defendant Unions are parties to a collective bargaining agreement.

2. The collective bargaining agreement between Plaintiff and Defendant Unions prohibits strikes and picketing during the life of said agreement.

3. Defendants are engaged in a work stoppage in violation of the no-strike provision of the collective bargaining agreement.

4. Defendants' work stoppage is over a dispute concerning the terms and conditions under which Plaintiff's employees are to work and said dispute is subject to the compulsory grievance and arbitration procedures of the collective bargaining agreement between Plaintiff Catalytic, Inc. and Defendant Unions.

5. Defendants' work stoppage is likely to continue unless restrained by this Court.

6. Plaintiff has suffered and will continue to suffer substantial and irreparable injury, as a result of the work stoppage by Defendants.

Appendix A

7. Plaintiff has no adequate remedy at law.

8. If this Order to Show Cause and Temporary Restraining Order be granted, the injury, if any, to Defendants herein if final judgment be in their favor, would be adequately indemnified by bond.

9. As to each item of relief granted to Plaintiff herein greater injury will be inflicted upon Plaintiff by the denial of such relief than will be inflicted upon Defendants by the granting of such relief.

IT IS THEREFORE ORDERED AND DECREED:

1. That Defendant Unions are ORDERED to show cause at a hearing on 1st day of July, 1986, at 9 A.M. in Courtroom 6, United States Courthouse, Trenton, New Jersey, why preliminary injunctive relief shall not be granted against them; and defendants shall serve, file and submit all briefs and affidavits in opposition on or before June 24 and plaintiff shall serve, file and submit any reply briefs and affidavits on or before June 27, 1986.

2. That Defendant Unions, the individual Defendants, individually and collectively, the members of Defendant Unions, their officers, agents, servants, representatives and employees, individually and collectively, and all other persons acting in concert with them or otherwise participating in their aid are ENJOINED from doing the following acts, or any one of them:

(a) Ordering the employees of Plaintiff (other than those whose employment has been terminated) who are represented by Defendant Unions, not to

return to work;

(b) Order such employees to engage in any stoppage of work, interruption or disruption of operations;

(c) Engaging in any stoppage of work, interruption or disruption of operations;

(d) Taking any action or pursuing any course of conduct, which is intended to, or has the effect of violating, interfering with, or disturbing the duties of the employees of Plaintiff under and pursuant to the current collective bargaining agreement as long as that agreement is in effect;

(e) From picketing, handbilling at the job site, carrying signs stating employees are on strike, and/or otherwise inducing or permitting or in any other manner interfering with persons attempting to enter or leave the Oyster Creek Nuclear Generating Station.

IT IS FURTHER ORDERED AND DECREED that the individual named Defendants and the officers of Defendant Unions are directed to communicate or cause to be communicated forthwith to all members of Defendant Unions who are employees of Plaintiff, by means reasonably calculated to insure receipt thereof, the fact that an Order to Show Cause and Temporary Restraining Order has been issued by this Honorable Court, the contents thereof.

This Temporary Restraining Order is on condition that a bond

be filed by Plaintiff in the sum of $500 conditioned for payment of such costs and damages as may be incurred or suffered by any party who was found to be wrongfully enjoined or restrained and the bond of Fidelity Mutual Casualty of Maryland as surety is hereby approved for such purpose.

The Temporary Restraining Order to continue until such time or until further order of this Court.

BY THE COURT:

s/ Garrett E. Brown
U.S.D.J.

Issued at 9:45 A.M. this
18th day of June, 1986

Injunction Bond in the amount
of $ filed this day
of June, 1986

APPENDIX B—UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, FINAL JUDGMENT AND ORDER FOR PERMANENT INJUNCTIVE RELIEF, OCTOBER 16, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION
NO. Civ. 86-2326 (GEB)

CATALYTIC, INC.,
Centre Square West
1500 Market Street
Philadelphia, PA 19102

Plaintiff

V.

MONMOUTH AND OCEAN COUNTY
BUILDING TRADES COUNCIL
Highway 38
P.0. Box 1256
Wall, NJ 07719

and

ASBESTOS WORKERS LOCAL 14
6513 Bustleton Avenue
Philadelphia, PA 19124

and

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PAT EIDING,
Business Manager,
Asbestos Workers Local 14
6513 Bustleton Avenue
Philadelphia, PA 19124

and

BOILERMAKERS LOCAL 28
976 Broadway
Bayonne, NJ 07002

and

DAN KEARNEY,
Business Manager,
Boilermakers Local 28
976 Broadway
Bayonne, NJ 07002

and

BRICKLAYERS AND CEMENT
MASONS LOCAL 8
122 Drummond Avenue
Nepute, NJ 07753

and

TOM FARRELL,
Business Manager,
Bricklayers and Cement
Masons Local 8
122 Drummond Avenue
Nepute, NJ 07753

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and

CARPENTERS AND MILLWRIGHTS
LOCAL 2018
3015 Lakehurst Road
Lakehurst, NJ 08773

and

FRANK KIRAJACICH,
Business Manager,
Carpenters and Millwrights
Local 2018
3015 Lakehurst Road
Lakehurst, NJ 08733

and

ELECTRICAL WORKERS LOCAL 400
Highway 38
P.0. Box 1256
Wall, NJ 07719

and

JIM GRATTON,
Business Manager,
Electrical Workers Local 400
Highway 38
P.0. Box 1256
Wall, NJ 07719

and

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IRONWORKERS LOCAL 350
5305 Atlantic Avenue
Ventnor City, NJ 08406

and

TOM KEPNER,
Business Manager,
Ironworkers Local 350
5305 Atlantic Avenue
Ventnor City, NJ 08406

and

LABORERS LOCAL 415
36 North Illinois Avenue
Atlantic City, NJ 08401

and

WILLIAM COLEMAN,
Business Manager,
Laborers Local 415
36 North Illinois Avenue
Atlantic City, NJ 08401

and

PAINTERS LOCAL 694
122 Drummond Avenue
Neptune, NJ 07753

and

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ROBERT NEWMAN,
Business Manager,
Painters Local 694
122 Drummond Avenue
Neptune, NJ 07753

and

PIPEFITTERS LOCAL 9
9 Gilbert Road
West Tinton Falls, NJ 07701

and

TOM SPERLING,
Business Manager,
Pipefitters Local 9
9 Gilbert Road West
Tinton Falls, NJ 07701

and

SHEETMETAL WORKERS LOCAL 27
884 Livingston Avenue
Brunswick, NJ 08902

and

ROBERT DEBARTOLLO,
Business Manager,
Sheetmetal Workers Local 27
884 Livingston Avenue
Brunswick, NJ 08902

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and

OPERATING ENGINEERS LOCAL 825
Route 46 East
Little Falls, NJ 07242

and

PAT CAMPBELL,
Business Manager,
Operating Engineers Local 825
Route 46 East
Little Falls, NJ 07242

and

ALL OFFICERS, AGENTS, SERVANTS
MEMBERS OR EMPLOYEES OF UNITED
ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF
THE PLUMBING AND PIPEFITTING INDUSTRY,
INDIVIDUALLY AND COLLECTIVELY

and

ALL OTHER PERSONS ACTING IN
CONCERT WITH DEFENDANTS,
INDIVIDUALLY OR COLLECTIVELY,
OR OTHERWISE PARTICIPATING
IN THEIR AID

Defendants

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FINAL JUDGMENT AND ORDER FOR PERMANENT INJUNCTIVE RELIEF

This action came on for hearing before the court, Honorable Garrett E. Brown, Jr. presiding. The issues having being duly tried, it appears to the Court that:

1. Plaintiff Catalytic, Inc. and Defendant Unions are parties to a collective bargaining agreement.

2. The collective bargaining agreement between Plaintiff and Defendant Unions prohibits strikes and picketing during the life of said agreement.

3. Defendant Unions, other than Operating Engineers Local 825, engaged in a work stoppage in violation of the nostrike provision of the collective bargaining agreement. Operating Engineers Local 825, through its picketing and handbilling, precipitated the work stoppage by the Defendant Unions.

4. The aforementioned work stoppage, and the picketing and handbilling by Operating Engineers Local 825, was over a dispute concerning the terms and conditions under which Plaintiff's employees are to work and said dispute is subject to the compulsory grievance and arbitration procedures of the collective bargaining agreement between Plaintiff Catalytic, Inc. and Defendant Unions.

5. The aforementioned work stoppage, and the picketing and handbilling by Operating Engineers Local 825, was likely to continue unless restrained by this Court. The Court therefore entered a Temporary Restraining Order and, after hearing, a Preliminary Injunction. That Preliminary Injunction currently remains in effect. If a permanent injunction is not entered the

work stoppage is likely to continue.

6. Plaintiff has suffered and would have continued to suffer substantial and irreparable injury as a result of the work stoppage by Defendants had it not been enJoined by the Court.

7. Plaintiff has no adequate remedy at law.

8. As to each item of relief granted to Plaintiff herein greater injury will be inflicted upon Plaintiff by the denial of such relief than will be inflicted upon Defendants by the granting of such relief.

IT IS THEREFORE ORDERED AND DECREED, this 16th day of October, 1986:

1. That Defendant Unions, the individual Defendants, individually and collectively, the members of Defendant Unions, their officers, agents, servants, representatives and employees, individually and collectively, and all other persons acting in concert with them or otherwise participating in their aid are permanently ENJOINED from doing the following acts, or any one of them, in connection with the dispute between Plaintiff and the Defendant Unions concerning paragraph 2 of the collective bargaining agreement:

a. Ordering the employees of Plaintiff (other than those whose employment has been terminated) who are represented by Defendant Unions, not to return to work;

b. Ordering such employees to engage in any stoppage of work, interruption or disruption of operations;

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c. Engaging in any stoppage of work, interruption or disruption of operations;

d. Taking any action or pursuing any course of conduct, which is intended to, or has the effect of violating, interfering with, or disturbing the duties of the employees of Plaintiff under and pursuant to the current collective bargaining agreement as long as that agreement is in effect.

e. From picketing, handbilling at the job site, and/or otherwise inducing or permitting or in any other manner interfering with persons attempting to enter or leave the Oyster Creek Nuclear Generating Station.

IT IS FURTHER ORDERED AND DECREED:

2. That the individual named Defendants and the officers of Defendant Unions are directed to communicate or cause to be communicated forthwith to all members of Defendant Unions who are employees of Plaintiff, by means reasonably calculated to insure receipt thereof, the fact that an Order and Judgment granting permanent injunctive relief has been issued by this Honorable Court, and the contents thereof.

IT IS FURTHER ORDERED AND DECREED:

3. That Plaintiff and the Defendant Unions are directed to proceed to arbitration on the dispute concerning paragraph 2 of the collective bargaining agreement between Plaintiff and Defendants.

IT IS FURTHER ORDERED AND DECREED:.

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4. That Plaintiff's claim for monetary damages against all Defendants is dismissed without prejudice pursuant to a stipulation of the parties.

5. That the counterclaim of Defendants Ironworkers Local No. 350 and Thomas Kepner, Business Manager for Ironworkers Local No. 350, is dismissed without prejudice pursuant to a stipulation of the parties.

6. That each party to this proceeding will bear its own costs and attorneys fees pursuant to a stipulation of the parties.

BY THE COURT:

s/ Garrett E. Brown
U.S.D.J.

Dated: October 16, 1986

APPENDIX C—UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, OPINION, SEPTEMBER 23, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 86-5813

CATALYTIC, INC.

v.

MONMOUTH & OCEAN COUNTY BUILDING TRADES COUNCIL, ASBESTOS WORKERS LOCAL 14, PAT EIDING, BOILERMAKERS LOCAL 28, DAN KEARNEY, BRICKLAYERS & CEMENT MASONS LOCAL 8, TOM FARRELL, CARPENTERS & MILLWRIGHTS LOCAL 2018, FRANK KIRAJACICH, ELECTRICAL WORKERS LOCAL 400, JIM GRATTON, IRONWORKERS LOCAL 350, TOM KEPNER, LABORERS LOCAL 415, WILLIAM COLEMAN, PAINTERS LOCAL 694, ROBERT NEWMAN, PIPEFITTERS LOCAL 9, TOM SPERLING, SHEETMETAL WORKERS LOCAL 27, ROBERT DEBARTOLLO, TEAMSTERS LOCAL 469, FRED POTTER, JR., OPERATING ENGINEERS LOCAL 825, PAT CAMPBELL, ALL OFFICERS, AGENTS, SERVANTS, MEMBERS OR EMPLOYEES OF UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY, individually and collectively, ALL OTHER PERSONS ACTING IN CONCERT WITH DEFENDANTS, individually or collectively or otherwise participating in their aid

Local 825, International Union of Operating Engineers and Patrick Campbell, Business Manager, Local 825 International Union of Operating Engineers, *Appellants*

Appendix C

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY
(D.C. Civil Action No. 86-2326)

Argued June 22, 1987

Before: GIBBONS, *Chief Judge*, WEIS
and ALDISERT, *Circuit Judges*

Filed September 23, 1987

David S. Solomon, Esquire (ARGUED)
David Grossman, Esquire
Schneider, Cohen, Solomon, Leder & Montalbano
591 Summit Avenue
Jersey City, New Jersey 07306

Attorneys for Appellants

Francis M. Milone, Esquire (ARGUED)
Steven R. Wall, Esquire
2000 One Logan Square
Philadelphia, PA 19103

Of Counsel:
Morgan, Lewis & Bockius

Attorneys for Appellees

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OPINION OF THE COURT

WEIS, *Circuit Judge.*

The district court enjoined a number of unions to cease a work stoppage precipitated by Local 825's activities at the plant gates. Among the craft unions only Local 825 appeals, asserting that none of those who refused to work were its members and, consequently, the union could not be enjoined. We will affirm because Local 825 was party to a master agreement and in the alternative, because the injunction as directed to third parties is effective. We also conclude that in the circumstances Local 825's leafletting was not protected activity, but was a signal designed to cause the work stoppage in violation of collective bargaining agreements.

This litigation stems from a jurisdictional dispute between unions and employers at the Oyster Creek Nuclear Generating Plant in Forked River, New Jersey. GPU Nuclear, Inc. operates the plant, which is owned by Jersey Central Power and Light Company. Catalytic, Inc., a general contractor, has provided engineering maintenance service to GPU.

To fulfill the terms of the contract with GPU, Catalytic employs, as needed, members of various craft unions, including Local 825 of the Operating Engineers. Catalytic had negotiated with the Building Trades Council a collective bargaining agreement governed by the terms of the "General Presidents' Project Maintenance Agreement by Contract." This document recited that the parties "recognized there is an essential difference in the conditions required to perform this type of work . . .. [I]n order to insure relative equity and uniform interpretation and

application, the Unions wish to establish and administer said Collective Agreement in concert each with the other, and all with the Contractor."

The President's Agreement stated that "the Contractor and the Unions agree that, due to the particular work covered by the Agreement, there shall be no lock outs or strikes during the life of this Agreement, and provisions must be made to achieve this end." The agreement acknowledged that GPU may limit the scope of work for assignment. It provided that the "Unions and the Contractor understand that the owner may choose to perform . . . any part or parts of the work necessary on his project with due consideration given to achieving the highest maintenance standards and harmonious working conditions." The contract further endorsed "the concept that jurisdictional disputes cannot . . . interfere with the efficient and continuous operations required in the successful application of the intent of this agreement."

In addition to non-strike, non-lock out and non-work stoppage clauses, the agreement also included a grievance procedure that established arbitration as a forum of last resort. An addendum to the contract provided that the "Owner's specialty shops, such as . . . crane services . . . will support building trades crafts by providing the required support services." The presidents of the craft unions, including the Operating Engineers, signed the contract and representatives of the various locals approved the addendum.

At the time this dispute arose, employees of the owner, Jersey Central, were manning both mobile and stationary cranes at the job site. When Local 825 observed this practice, it insisted that its members be assigned to operate the mobile cranes. On May 20 and 21, 1986, as a result of picketing by Local 825 over this

issue, the other craft union members on the site engaged in a work stoppage.

On June 13, 1986, Local 825 members appeared at the plant's entrances and handed out leaflets that protested assignment of mobile crane work to "non-building trades" employees. The body of the handbill charged Jersey Central and GPU Nuclear with being "unfair" to Local 825. In much smaller type at the bottom, the flyer stated that "[o]ur dispute is only with GPU Nuclear and [Jersey Central]. We do not seek to enmesh any other employer in this dispute, and we do not seek to induce or encourage an individual employed by any person engaged in commerce to cease doing business with any other employer." At the time of the picketing and handbilling and for some time before those incidents, no member of Local 825 actually worked at the Oyster Creek plant.

On application of Catalytic, the district court granted a temporary restraining order. After a hearing, the court issued a permanent injunction directing the parties to arbitrate the dispute over the provision of the collective bargaining addendum permitting support services by the owner. The unions were enjoined from ordering their members not to work or from taking any action that would hinder Catalytic's employees in performing their duties. Local 825 and the other craft unions were prohibited from "picketing, handbilling at the job site, and/or otherwise inducing or permitting or in any other manner interfering with persons attempting to enter or leave the Oyster Creek Nuclear Generating Station."

The district court made the following findings of fact: (1) Catalytic and defendant unions (including Local 825) were parties to a collective bargaining agreement; (2) the agreement prohibited strikes and picketing; (3) defendant unions other than Local 825 engaged in a work stoppage precipitated by Local 825's

picketing and leafletting; (4) the dispute was over working conditions and terms, and was subject to the grievance-arbitration procedure set out in the collective bargaining agreement.

Only Local 825 has appealed. It contends that no collective bargaining agreement was in effect in May and June 1986; moreover, even if there had been such a contract, the district court abused its discretion in granting an injunction because Local 825 did not join in the strike or work stoppage. Finally, the union asserts that the handbilling was protected activity under the Constitution and National Labor Relations Act.

I.

Although the Building Trades Council stipulated in writing that the pre-existing labor agreement with the craft unions extended to September 1, 1988, Local 825 maintains that it had not signed an extension with Catalytic because the owners had refused to acquiesce in the demand that Operating Engineers operate the mobile cranes. The district court, however, found that the bargaining agreement in fact continued beyond the stated expiration date of February 28, 1986. Under past practice, the collective bargaining agreement had continued in effect without regard for technical expiration dates while the parties negotiated a new extension.

Catalytic's director of labor relations testified that an uninterrupted collective bargaining relationship with the craft unions had existed since March 1983, notwithstanding that several craft unions had failed to sign extensions at various times during the three-year period. Customarily, negotiations often had commenced only after the technical expiration of the previous extension. The court also noted that all defendant unions except Local 825 conceded the

existence of current collective bargaining agreements with Catalytic, even though several locals had not signed extensions beyond February 1986. The district judge commented, "I find no way to distinguish your local [Local 825] from the other locals on that point."

In addition, Catalytic's project manager testified without contradiction that in March 1986 Local 825 had protested because one of its members had not been assigned to a job which was given to a member of another craft union. Local 825's complaint, which occurred after the collective bargaining agreement had allegedly expired, was inconsistent with the union's position at trial that no agreement with Catalytic was in effect. The court observed, moreover, that although the agreement specifically required a party to give notice of termination in order to end the relationship, Local 825 had never done so. .

Finally, the court saw no difficulty in requiring Local 825 to resolve its grievance over crane operators during negotiations for a new contract. The proposed agreement was not contemplated as simply another extension, but rather was designed to create a more comprehensive relationship among craft unions and contractors at Oyster Creek, including Local 825 and Catalytic.

Based on the record before the district court, we conclude that the finding that Local 825 and Catalytic were parties to a viable collective bargaining agreement was not clearly erroneous.

II.

Local 825 contends that the district court abused its discretion in granting the injunction.

Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970), held that federal courts have power under § 301 of the National Labor Management Relations Act, 29 U.S.C. § 185, to enforce an

agreement to arbitrate unresolved grievances and to enjoin a work stoppage. In that case the district court ordered the parties to arbitrate and barred a strike, all picketing in the vicinity of the petitioner's place of business, and any attempts by the union to induce the employees to strike or refuse to perform their services. *See id.* at 240.

The Supreme Court concluded that the "literal terms [of the section prohibiting injunctions in labor disputes] of the Norris-LaGuardia Act must be accommodated to the subsequently enacted provisions of § 301(a) of the Labor Management Relations Act and the purposes of arbitration." 398 U.S. at 250. The Court reasoned that "the very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of industrial disputes without resort to strikes, lockouts, or other self-help measures." That aim is largely subverted "if there is no immediate, effective remedy for those very tactics that arbitration is designed to obviate." *Id.* at 249.

Buffalo Forge Co. v. United Steelworkers of America, 428 U.S. 397 (1976), however, disapproved an injunction against a sympathy strike that allegedly violated a no-strike clause. The Court distinguished *Boys Markets* because the *Buffalo Forge* strike was "not *over* any dispute between the Union and the employer that was even remotely subject to the arbitration provisions of the contract." *Id.* at 407 [emphasis in original]. Neither the cause of the strike nor the dispute underlying it was subject to the grievance procedures in the collective bargaining agreement.

As noted above, the district court here found as a fact that the controversy fell within the scope of the grievance procedure. Local 825 argues that its dispute is solely with GPU Nuclear (or Jersey Central). Nevertheless, assignment of the work that the union

requests is a subject of the collective bargaining agreement. That the controversy may also implicate a nonparty – Jersey Central or GPU Nuclear – does not remove the matter from the purview of Catalytic's contract. Local 825 cannot confine its demand to one of the two employers to the exclusion of the other.

The President's Maintenance Agreement emphasizes that unique conditions mandate that no work stoppage occur – particularly those arising from jurisdictional disputes. The agreement, moreover, sets forth various means to achieve that end, including arbitration. GPU Nuclear and Jersey Central also have collective bargaining agreements with the electricians' union, whose members operate the mobile cranes. The real dispute in this case is a jurisdictional one -- whether the operating engineers or the electricians' union members should work the mobile cranes.

Local 825 contends that because none of its members engaged in a strike or work stoppage, *Boys Markets* does not govern here. But the union reads that case too narrowly. In amplifying the desirability of arbitration, the Court observed such procedures would discourage "strikes, lock outs, or other self-help measures" for which there must be an "immediate, effective remedy." 398 U.S. at 249.

In the case at hand, the handbilling at the plant gate constituted self-help, triggering a work stoppage just as effectively as the picketing some weeks earlier. The measure was designed to bring pressure on Catalytic in precisely the same manner as a strike and, consequently, came within the ambit of the *Boys Markets* rationale. The special provisions of the President's Agreement augment the factors counselling application of *Boys Market in this case.*

Even if we accept Local 825's contention that *Boys Markets* does not apply because its members were not employed at the time, the other craft unions

unquestionably engaged in a work stoppage and, therefore, the injunction would have to be sustained as it applies to them. Indeed, the other unions have not appealed, and the injunction remains effective against them.

This valid order against the other unions presents an alternative basis for upholding the injunction against Local 825. As we pointed out in *Pittsburgh-Des Moines Steel Co. v. United Steelworkers of America*, 633 F.2d 302, 307 (3d Cir. 1980), when an injunction has issued against a party to a contract, to prevent a violation "there must be authority to issue injunctive relief even against third parties where such relief is necessary." In that case we said, moreover, that orders could be made against third parties when "merely helpful[] in effectuating the relief against the contracting party in default." We concluded that the basis for relief was "not culpability, but practical necessity." *Id.*

In *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977), the Supreme Court, citing the All Writs Act, 28 U.S.C. § 1651, reiterated the power of the federal courts to issue such orders "as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." That power has been used even against third persons not parties to the underlying dispute. *See Bullock v. United States*, 265 F.2d 683 (6th Cir.), *cert. denied*, 360 U.S. 909 (1959).

No attenuated exercise of compulsion is present in this case. Local 825 is not only joined as a party to the suit but is a signatory to the contract as well. The participants expressly covenanted to administer the agreement in "concert, each with the other [union], and all with the Contractor." Activity promoting disharmony is not acting in concert with this program.

See Fed. R. Civ. P. 65(d) (An injunction is binding not only on the parties but also "those persons in active concert or participation with them who receive actual notice of the order."). *See also Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945) (injunction not only binds the defendants but also those parties "identified with them in interest, in 'privity' with them, represented by them or subject to their control"); *Chase Nat'l Bank v. City of Norwalk*, 291 U.S. 431, 436 (1934); *Thompson v. Freeman*, 648 F.2d 1144, 1147 (8th Cir. 1981).

We conclude that in these circumstances the court has power to enjoin conduct by third persons – in this case, Local 825 and its officers -- that effectively precipitates action frustrating the arbitral process, even if that activity might not come within the boundaries of the *Boys Markets* exemption. We uphold the injunction on this alternative basis as well.

We also reject the contention that Pat Campbell, the business manager of Local 825, should not have been included among the defendants enjoined. As we observed in *Wilkes-Barre, Publishing Co. v. Newspaper Guild of Wilkes-Barre Local 120*, 647 F.2d 372, 378 (3d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982), "[u]nion officials are joined routinely in § 301(a) actions seeking the injunctive and declaratory relief permitted by *Boys Markets*."

III.

Local 825 argues that its handbilling was protected activity under the Constitution and the National Labor Relations Act. The union maintains that picketing differs from handbilling because of the absence of patrolling and also because the presence of a picket line may induce action irrespective of the nature of the ideas being disseminated.

In commenting on the evidence, the district judge said, "I'm just focusing on handing out leaflets at the

plant gate, which we have seen for three days has had the effect of a picket line, in effect, because nobody would cross it, and apparently causes great concern on the part of the employees about going in there." Counsel for one of the unions commented during argument in the district court about the handbilling, "It's a signal. There's no question about that."

The National Labor Relations Board uses the term "signal picketing" to describe activity short of a true picket line which conveys to neutrals that the union solicits their sympathetic action. *See International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local No. 433 v. NLRB*, 598 F.2d 1154, 1158 n.6 (9th Cir. 1979); *see also NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 690 (1951) ("That the placecard was merely such a signal, tantamount to a direction to strike, was found by the Board"); *cf. International Bhd. of Electrical Workers v. NLRB*, 341 U.S. 694, 700 (1951) ("no finding here that the picketing and other activities of petitioners were mere signals in starting and stopping a strike").

The record shows that the handbilling at the plant gates effectively caused work stoppages. When the plant reserved a gate exclusively for Catalytic, Local 825 leafletted another entrance, but the employees refused to enter the site.[1]

Local 825 asserts that its leafletting is protected under the publicity proviso of the National Labor Relations Act. This clause states that the Act should not be construed "to prohibit publicity, other than picketing, for . . . advising the public . . . that a product or products are produced by an employer with whom the labor organization has a primary dispute

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1. *See* NLRB v. Local 825, A, B, C, D, Int'l Union of Operating Engineers, 659 F.2d 379, 386 (3d Cir. 1981) (general contractor may lawfully force a union to picket only designated separate gates).

and are distributed by another employer, *as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer . . . not to perform any services, at the establishment of the employer engaged in such distribution.*" 29 U.S.C. § 158(b)(4) (emphasis supplied). The publicity proviso follows the provision that authorizes the Board to secure an injunction to restrain secondary picketing.

Local 825 maintains that the primary employer, GPU Nuclear or Jersey Central, was the target of this publicity and that Catalytic was only a secondary object. But the district court's finding that the leafletting effectively induced a work stoppage of Catalytic employees places Local 825 outside the scope of the publicity proviso.[2]

The simple cause-and-effect of the appearance of leafletters and work stoppages eloquently testified to the purpose of the enterprise. The union calls our attention to the wording of the leaflets which cites the grievance against Jersey Central and GPU Nuclear. But the text of the leaflets did not restrict the district court's duty to define Local 825's purpose. The union's

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2. We note that the NLRB found that Local 825 had engaged in secondary activity that violated 29 U.S.C. § 158(b)(4). Local 825 suggests for the first time on appeal that its handbilling represents primary activity and, therefore, it is not prohibited under the secondary boycott provisions of the National Labor Relations Act, 29 U.S.C. § 158(b)(4). The presence of the primary employer during the disputed activity is not dispositive of the character of that activity. It may be classified as primary so long as it "discloses clearly that the dispute is with the primary employer." *See* NLRB v. Local 825, A, B, C, D, Int'l Union of Operating Engineers, 659 F.2d 379, 384 (3d Cir. 1981). The district court found that the union failed to make its primary objective clear. Although the onus purportedly lay with the owners/operators of the plant, in reality Local 825 sought to coerce GPU Nuclear and Jersey Central through Catalytic.

"argument ignores the wide latitude open to triers of fact to make factual determinations on the basis of rational inferences which arise from the nature, location, and effect of picketing." *American Radio Ass'n, AFL-CIO v. Mobile Steamship Ass'n, Inc.*, 419 U.S. 215, 232 (1974).

The repeated work stoppages demonstrated that Local 825 sought to persuade the other craft unions to violate their contractual no strike obligation. If the union lacked this intent, it could have phrased the leaflets to urge Catalytic employees not to engage in a work stoppage. The carefully vague and legalistic statement on the flyer carried no such message and, indeed, its very tone may have been a signal in itself.

As a general matter, peaceful picketing and leafletting are expressive activities protected by the first amendment; however, the courts regularly have rejected the view that persons who wish to "propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." *United States v. Grace*, 461 U.S. 171, 177-78 (1983). Reasonable time, place, and manner restrictions may be imposed under certain conditions.

In *International Longshoremen's Ass'n, AFL-CIO v. Allied Int'l, Inc.*, 456 U.S. 212 (1982), the Court said: "We have consistently rejected the claim that secondary picketing by labor unions in violation of § 8(b)(4) is protected activity under the First Amendment.. . . It would seem even clearer that conduct designed not to communicate but to coerce merits still less consideration under the First Amendment." *Id.* at 226. The Court noted favorably Justice Stevens' comment in *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607, 619 (1980), that "[t]he statutory ban in this case affects only that aspect of the union's effort to communicate its views that calls for an automatic response to a

signal, rather than a reasoned response to an idea." *Id.* at 226 n.26 (quoting *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring)). *Cf. Florida Gulf Coast Bldg. & Constr. Trades v. NLRB*, 796 F.2d 1328, 1334 & n.6 (11th Cir. 1986), *cert. granted*, 55 U.S.L.W. 3815 (U.S. June 9, 1987).

The Supreme Court observed in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982), that it has "recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association." Specifically, the Court mentioned that secondary boycotts and picketing could be prohibited. Noting that various terms have been used to describe the government's interest, the Court asserted that a regulation is sufficiently justified "if it is within the constitutional power of the government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 458 U.S. at 912 n.47.

In the case at hand, the restrictions on leafletting were quite limited and applied only to a very small area – i.e., the plant gates. The prohibition was not applied to the content of the flyers and ample alternative means remained for the union to disseminate its views. No time and manner restrictions were imposed on leafletting and only a minor proscription applied to location. The reality is that the union's leafletting was a signal to the other unions to engage in a work stoppage contrary to the public policy expounded in *Boys Markets* of encouraging resolution of labor disputes by arbitration.

Even if we accept the union's representation that its dispute rests with GPU and Jersey Central, the leafletting had to reckon with the prohibition of secondary activity by the National Labor Relations Act. That issue, however, has not been presented for our consideration.[3]

Accordingly, the judgment of the district court will be affirmed.

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3. That the activity may come within the scope of the National Labor Relations Act does not preclude a suit under § 301. "When, however, the activity in question also constitutes a breach of a collective-bargaining agreement, the Board's authority 'is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301.'" William E. Arnold Co. v. Carpenters District Council of Jacksonville and Vicinity, 417 U.S. 12, 16 (1974) (quoting Smith v. Evening News Ass'n, 371 U.S. 195, 197 (1962)); Amalgamated Ass'n of Street, Elec. Ry & Motor Coach Employees v. Lockridge, 403 U.S. 274, 298 (1971).

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX D—UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, JUDGMENT, SEPTEMBER 23, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5813

CATALYTIC, INC.,

v.

MONMOUTH AND OCEAN COUNTY BUILDING TRADES COUNCIL, ASBESTOS WORKERS LOCAL 14, PAT EIDING, BOILERMAKERS LOCAL 28, DAN KEARNEY, BRICKLAYERS AND CEMENT MASONS LOCAL 8, TOM FARRELL, CARPENTERS AND MILLWRIGHTS LOCAL 2018, FRANK KIRAJACICH, ELECTRICAL WORKERS LOCAL 400, JIM GRATTON, IRONWORKERS LOCAL 350, TOM KEPNER, LABORERS LOCAL 415, WILLIAM COLEMAN, PAINTERS LOCAL 694, ROBERT NEWMAN, PIPEFITTERS LOCAL 9, TOM SPERLING, SHEETMETAL WORKERS LOCAL 27, ROBERT DEBARTOLLO, TEAMSTERS LOCAL 469, FRED POTTER, JR., OPERATING ENGINEERS LOCAL 825, PAT CAMPBELL, ALL OFFICERS, AGENTS, SERVANTS, MEMBERS OR EMPLOYEES OF UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY, individually and collectively, ALL OTHER PERSONS ACTING IN CONCERT WITH DEFENDANTS, individually or collectively or otherwise participating in their aid

Appendix D

Local 825, International Union Engineers and Patrick Campbell, Business Manager, Local 825 International Union of Operating Engineers,

Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil Action No. 86-2326)

Present: GIBBONS, *Chief Judge,*
WEIS and ALDISERT, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel June 22, 1987.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered October 20, 1986, be, and the same is hereby affirmed. Costs taxed against the appellants.

ATTEST:

s/ Sally Mrvos
Clerk

September 23, 1987

Costs taxed in favor of Catalytic, Inc. as follows:

Appendix D

Appendix	$453.30
Brief	$148.02
TOTAL	$601.32

Certified as a true copy and issued in lieu
of a formal mandate on October 15, 1987

Test: M. Elizabeth Ferguson
Chief Deputy Clerk,
United States Court of Appeals,
for the Third Circuit

APPENDIX E—UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, ORDER AMENDING OPINION, OCTOBER 29, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5813

CATALYTIC, INC.

v.

MONMOUTH & OCEAN COUNTY BUILDING TRADES COUNCIL, ASBESTOS WORKERS LOCAL 14, PAT EIDING, BOILERMAKERS LOCAL 28, DAN KEARNEY, BRICKLAYERS & CEMENT MASONS LOCAL 8, TOM FARRELL, CARPENTERS & MILLWRIGHTS LOCAL 2018, FRANK KIRAJACICH, ELECTRICAL WORKERS LOCAL 400, JIM GRATTON, IRONWORKERS LOCAL 350, TOM KEPNER, LABORERS LOCAL 415, WILLIAM COLEMAN, PAINTERS LOCAL 694, ROBERT NEWMAN, PIPEFITTERS LOCAL 9, TOM SPERLING, SHEETMETAL WORKERS LOCAL 27, ROBERT DEBARTOLLO, TEAMSTERS LOCAL 469, FRED POTTER, JR., OPERATING ENGINEERS LOCAL 825, PAT CAMPBELL, ALL OFFICERS, AGENTS, SERVANTS, MEMBERS OR EMPLOYEES OF UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY, individually and collectively, ALL OTHER PERSONS ACTING IN CONCERT WITH DEFENDANTS, individually or collectively or otherwise participating in their aid

Local 825, International Union of Operating Engineers and Patrick Campbell, Business Manager, Local 825 International Union of Operating Engineers, *Appellants*

Appendix E

Present: GIBBONS, *Chief Judge*,
WEIS and ALDISERT, *Circuit Judges*.

ORDER AMENDING OPINION

It is ordered that the opinion filed in the above captioned case is amended as follows:

The first sentence of footnote 2 on page 13 of the slip opinion is deleted. The footnote will begin with the sentence, "Local 825 suggests for the first time . . .."

BY THE COURT,

/s/ Joseph F. Weis, Jr.

Circuit Judge

DATED: October 29, 1987

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX F—RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, First Amendment

AMENDMENT 1

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Title 28, United States Code, § 1651

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

Title 29, United States Code, § 104(a)

§ 104. Acts not subject to restraining order or injunction

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment; . . . .

Appendix F

Title 29, United States Code, § 104(e)

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence; . . . .

Title 29, United States Code, § 158(b)(4)

(b) It shall be an unfair labor practice for a labor organization or its agents—

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e) [subsec. (e) of this section];

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 [29 USCS § 159]: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 [29 USCS § 159];

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act [29 USCS §§ 151–158, 159–168]: Provided, further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution; . . . .

Title 29, United States Code, § 185(a)

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.